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IN THE

Supreme Court of the United States

October Term, 1963

No. 206

PAUL DE FINA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul De Fina prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on March 26, 1963.

A. The Opinion Below

The opinion of the Court of Appeals in this case has been officially reported in 315 F. 2d 362 (1963). It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on March 26, 1963. On April 18, 1963, a petition for rehearing thereof was denied by said court. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance by the United States Court of Appeals for the Second Circuit.

C. Question Presented

Did Congress intend to include the "farm area" of a pier, located on a public street of a municipality, as one of the designated facilities under 18 U.S.C. Sec. 659?

D. Constitutional Provisions and Statutes

The Constitutional provisions and statutes involved are:

1. United States Constitution, Amendment V.

2. United States Code, Title 18, Section 659.

All of the foregoing are set forth in full in Appendix B annexed to this petition.

E. Summary Statement

A three count indictment was returned against the petitioner. He was found guilty of the one count charging a violation of 18 U.S.C. Sec. 659 and sentenced to imprisonment for two years. He has been released on bail.

F. Reasons for Granting the Writ

I.

18 U.S.C. Sec. 659 is applicable solely to thefts from designated facilities.

The proof adduced at the trial showed that eight cases of Cutty Sark Scotch whiskey, part of a foreign shipment, had been stolen from pallets on West Street, Borough of Manhattan, City of New York.

A motion was made for a judgment of acquittal predicated upon the statutory requirement that the theft must be from the designated facility, i.e., a wharf, set forth in the indictment, and not from a public street. The trial court denied the motion, but admitted that the cases of Scotch were:

> " . . . loaded on a pallet *outside* the steamship wharf from which, obviously, it had just been removed." (Emphasis added) (S.M. 128)*

Pointedly, where the whiskey had just been, once, twice or even ten times removed, was of no consequence. The sole issue was the location of the whiskey when it was stolen. If it was not stolen from a "wharf" then there was such a patent jurisdictional failure of proof as to constitute a fatal flaw in the prosecution. It became a larceny within the purview of the Penal Law of the State of New York.

18 U.S.C. Sec. 659 catalogues the following sites from which a theft of foreign or interstate baggage is prohibited.

1. Railroad car, wagon, motortruck or other vehicle.

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* S.M. refers to the page numbers in stenographic minutes filed in the United States Court of Appeals.

2. Station, Station house, platform or depot.

3. Steamboat, vessel or wharf.

4. Aircraft, air-terminal, airport, aircraft terminal or air navigation facility.

It does not set forth, "street" "dock" "farm area" or "pier". As the United States Court of Appeals for the Third Circuit stated in construing Section 659 in *United States* v. *Manuszak*, 234 F. 2d 421 (1956) at 423:

> "Under this statute it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes. That being so, an indictment which only charges a theft of goods from an interstate shipment of freight without alleging that the goods were taken from one of the specifically enumerated places or facilities does not charge all the essential ingredients of a crime so far as the federal government is concerned."

The same court reaffirmed its prior holding in *United States* v. *Allegrucci*, 258 F. 2d 70, 75 (1958) as to a "platform" and but recently in *United States* v. *Olivo*, 278 F. 2d 415 (1960) at 417 where it stated:

> "As to appellant's second contention, in regard to 18 U.S.C. Sec. 659, i.e., that the section applies only to thefts from specifically designated places along the interstate commerce route (including depots), the government concedes that it is accurate, as it must. See United States v. Manuszak, 3 Cir. 1956, 234 F. 2d 421; United States v. Cohen, 3 Cir. 1961, 274 F. 596."

18 U.S.C. Sec. 659 means what it says much the same as did former section 409 upon which it was based. The Sixth Circuit in construing former Section 409 in *Wolkoff* v. *United States*, 84 F. 2d 17 (1936), held that an indictment which failed to designate the place or places from which goods were stolen was fatally defective. As that Court said at 18:

> "The statute expressly 'covers' the stealing of goods from certain designated places.".

Congress has not seen fit to make a theft of goods from any or all facilities utilized in interstate commerce a violation of Section 659. It has left thefts from undesignated facilities to be dealt with by the states. Thus, if the instant theft was not from a "wharf" then there has not been the condition precedent to a violation of Section 659.

II.

The theft was from other than a designated facility.

A wharf is

> "A structure of timber, masonry, cement, earth or other material built along or at an angle from the shore of navigable waters (as a harbor or river) and made with a sometimes partially covered platform so that vessels may lie close alongside to receive and discharge cargo and passengers; specif: a structure of open rather than filled construction extending parallel to the shoreline."
>
> Webster's Third New International Dictionary of the English Language, p. 2599.

It has been succinctly defined in *John J. Sennon Co.* v. *United States*, 182 F. 573 (9th Cir. 1910), cert. den. 220 U. S. 609, at 576 as:

> "A structure used for the handling of freight in connection with the shipment or discharge of a cargo from a vessel, in other words an artificial landing place."

And yet more pithily by the New York Court of Appeals in *Langdon* v. *Mayor, etc., of City of New York*, 93 N. Y. 129 (1883) at 151 as:

> "A wharf is a structure, on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded."

The evidence presented at the trial was that a theft took place on West Street in the Borough of Manhattan, City of New York, in what was designated as the "farm area", and which had been leased by the City of New York to the lessee of Pier 51. Obviously a contract entered into between a municipality and a private corporation could not broaden the scope of a federal criminal statute. No proof was ever offered by the Government that the "farm area" was part of a "wharf" within the meaning of Section 659.

There was evidence to show a theft of whiskey. But there was such a variation between the indictment and the proof as to destroy the appellant's substantial right to be tried only on charges presented in an indictment returned by a Grand Jury. As this Court has stated in *Stirone* v. *United States*, 361 U. S. 212 (1960) at 217:

> "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."

There was thus a fundamental jurisdictional failure of proof on the part of the prosecution. The Trial Court was hence under a duty to direct an acquittal upon motion duly and timely made, where there was no evidence of a violation by the appellant of Section 659. Its refusal to do so constituted clear error and a conviction in a federal court of what was solely a state crime.

III.

18 U.S.C. Sec. 659 being unambiguous, it should have been given effect according to its literal language. The Circuit Court thus should not have engaged in statutory interpretation.

The Third Circuit in holding that Section 659 is applicable solely to thefts from designated facilities has held that an indictment which does not set forth the designated facility is jurisdictionally defective: *United States* v. *Manuszak*, *supra*. It even held that the defect was so fundamental that it could be quashed on appeal although it was never brought to the attention of the District Court.

The Second Circuit in *United States* v. *Wora*, 246 F. 2d 2[illegible] (1957) promptly proclaimed its conflict with the Third Circuit by holding that proof can cure a defective indictment. Its decision in the instant cause is but another step in this dispute between those Circuits. For the Second Circuit has now held that a theft of goods in foreign commerce constitutes a violation of Section 659, even though it did not transpire in a designated facility. All that is now required is that it transpire in an area customarily and

necessarily utilized for the purpose of foreign commerce. However, neither usage nor necessity can, by judicial declaration, extend the scope of a federal criminal statute. Nor can they be, if such be the event, a utilization for bringing a statutory gap caused by Congressional inadvertence or omission. For only those statutes which are ambiguous or of doubtful meaning are subject to the process of statutory interpretation. *Packard Motor Car Co. v. National Labor Relations Board*, 330 U. S. 485, 492. But there is naught to suggest that Congress ever so intended, although it could interdict and encompass all larcenies committed on goods in foreign or interstate commerce. The instant holding federally punishes a larceny from an undesignated facility customarily or necessarily utilized in interstate or foreign commerce. Yet such standards are too vague and indefinite, particularly without Congressional sanction, to extend the bounds of federal criminal conduct.

The Second Circuit has, under the mantle of construction, found a Congressional intent lacking in the statutory language. It thereupon strove to fulfill what it regarded as a non-expressed Congressional intent. *McFeely v. Commissioner of Int. Revenue*, 296 U. S. 102, 111. Such a determination is indeed beyond the province of the judicial process.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE KRIEGER
Attorney for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 295—October Term, 1962

(Argued March 26, 1963 Decided March 26, 1963)

Docket No. 27973

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL DE FINA,

Appellant.

Before:

WATERMAN and KAUFMAN, *Circuit Judges,*
and WEINFELD, *District Judge.*

Appellant was convicted in the United States District Court for the Southern District of New York, Dawson, *J.*, without jury, of violation of 18 U. S. C. § 659, and appeals from the denial of his motion for a judgment of acquittal. Conviction affirmed.

Appendix A
Opinion of the United States Court of Appeals

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York (Charles A. Stillman, Sheldon H. Elsen, Asst. United States Attorneys, of counsel), *for Appellee.*

THEODORE KRIEGER, New York City, *for Appellant.*

PER CURIAM:

After a trial before a judge sitting without jury appellant was convicted under 18 U. S. C. §659[1] of having stolen eight cases of Scotch whiskey, part of an arriving foreign shipment of freight and express, from a wharf at Pier 51, North River, New York. Appellant longshoreman did not testify in his own behalf. The evidence is conclusive that appellant stole the whiskey. In fact, he was apprehended while driving away an automobile which had been constantly under surveillance (as he had been) and in the trunk of which were seven of the stolen cases, the eighth being wedged in behind the front seat. However, he claims he is not guilty of the particular federal crime for which

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1 The pertinent portion of the statute upon which the indictment was based reads as follows:

"659. Interstate or foreign baggage, express or freight; state prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express:

* * *"

Appendix A
Opinion of the United States Court of Appeals

he was indicted and appeals from the failure of the trial judge to grant a motion for a directed judgment of acquittal.

Appellant's defense appears to be that, though every other element of the crime charged was proven and was not even disputed, there was no credible evidence that the theft took place on a "wharf." We disagree. An eyewitness employed for the very purpose of observing the longshoremen loading onto motor trucks shipments discharged from the vessel testified that he saw appellant placing the stolen whiskey cases in the conveniently opened trunk of the automobile. As part of the process of discharging these cases they were stacked on wooden pallets located in an area of the pier not marginal to the shore line and possibly within the bounds of the street. This area, called in the trade "the farm area of the pier,"[1] is customarily used during this process. Appellant carried the stolen cases from these stacks to the parked automobile. Appellant would have us hold that this procedure was not theft from the wharf itself but theft from somewhere else. Examining the facts most favorably to appellant, he stole goods being discharged from a vessel at a pier, which goods were in process of being loaded onto a land conveyance at the land area of the pier necessarily utilized for that purpose.

The court below properly found that the appellant's thievery was within the statutory compass and that he was guilty of the offense charged. It would frustrate the obvious intention of Congress were we to construe the statutory language in nay other way. The denial of the motion for a judgment of acquittal was proper, and the conviction is affirmed.

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1 "Wharf," "pier" and "dock" are commonly used interchangeably.

APPENDIX B

Constitutional Provision

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statute Involved

Title 18, United States Code

"659. Interstate or foreign baggage, express or freight—State prosecutions—

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute

an interstate or foreign shipment of freight or express. . . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 206

PAUL DE FINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 315 F. 2d 362.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1963. A petition for rehearing was denied on April 18, 1963. By order of Mr. Justice Harlan, dated May 13, 1963, the time to file a peti-

tion for a writ of certiorari was extended to June 18, 1963. The petition was filed on June 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the finding of the district court that goods moving in foreign commerce were stolen from a wharf.

STATUTE INVOLVED

Section 659 of Title 18 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.
>
> * * * * *

STATEMENT

In the United States District Court for the Southern District of New York, petitioner was found guilty by the court (jury having been waived) under an indictment charging that he stole eight cases of

whiskey moving as part of a foreign shipment "from a wharf at Pier 51, North River, New York". Petitioner was sentenced to imprisonment for two years.

It is not disputed that the evidence showed that petitioner stole the cases of whiskey and that they were part of a foreign shipment. The sole issue raised is whether evidence supports the conclusion that the merchandise was stolen from a "wharf".

The testimony showed that, in the process of discharging the whiskey from a boat, cases were stacked on wooden pallets located in the so-called farm area of the pier. The farm area is immediately adjacent to the pier on West Street, New York, is leased to the pier, and is customarily used for loading purposes (R. 7a-8a).[1] The district court held that the theft had been from a wharf (R. 9a-10a, 18a) and the court of appeals affirmed.

ARGUMENT

The indictment in this case charged and the trier of fact found that the whiskey was taken from a "wharf". There is thus no issue, as petitioner seems to suggest, as to whether the theft must be from one of the facilities specifically mentioned in 18 U.S.C. 659. The only question is whether the term "wharf" as used in the statute includes an area, such as that involved here, which is not actually on the water, but is customarily used in the process of

[1] On the diagram marked as government's exhibit 11 (R. 22a, App. B), the location of the pallets is designated as "P".

unloading cargo. The courts below properly concluded that it does. When Congress prohibited the theft of goods from a wharf, it manifestly was not referring merely to the part of the wharf which juts into the water, but meant to include the whole facility used for wharf purposes, which include the unloading of cargo. Thus the theft from the area regularly used for the unloading of cargo was properly deemed a theft from the wharf. See *United States* v. *Allegrucci*, 299 F. 2d 811, 813 (C.A. 3) in which the court held that theft from the sorting area of a railway express platform could properly be found to be a theft from a platform under Section 659.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JULY 1963

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